Supreme Court, U.S.
FILED
MAY 8 1969
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER L. FLETCHER, JR.,

Petitioner

versus

ANTHONY O'DONNELL and CITY OF ALLENTOWN,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT A CIVIL RIGHTS PLAINTIFF MAY NOT RECOVER COMPENSATORY DAMAGES AGAINST A MUNICIPALITY IN AN AMOUNT IN EXCESS OF THE AMOUNT OF COMPENSATORY DAMAGES WHICH THE TRIAL JUDGE URGED THE JURY TO AWARD AGAINST AN INDIVIDUAL DEFENDANT POLICE OFFICER IN THE SAME SUIT?

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.

WALTER L. FLETCHER, JR.,

Petitioner

versus

ANTHONY O'DONNELL and
CITY OF ALLENTOWN,

Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Walter L. Fletcher, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals, Third Circuit, entered March 8, 1989 is unrecorded and appears at page 23 of the Appendix herein.

Order and Opinion of the United States Court of Appeals, Third Circuit, dated 2/9/89 is recorded at ___F.2d _____(3d Cir, 1989) and appears at page 25 of the Appendix herein.

The Order of United States District Court Eastern District of Pennsylvania entered May 20, 1988, is unrecorded and appears at page 42 of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit is dated March 8, 1989. This Petition for a Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Court.

FEDERAL PROVISIONS INVOLVED

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

As amended by the Act of Dec. 29, 1979, Pub. L. NO. 96-170, Section 1, 93 Stat. 1284.

STATEMENT OF THE CASE

The Plaintiff filed suit against Anthony O'Donnell, a police officer with the Allentown Police Department, and also against the City of Allentown under 42 U.S.C. Section 1983 claiming violations of Plaintiff's constitutional rights to freedom from an illegal arrest and to his right to bodily security as guaranteed by the Fourteenth Amendment to the United States Constitution.

At trial, Plaintiff, a Black male, testified that he was at a white bar in the City of Allentown on October 15, 1986, (n.t. November 12, 1987, pp. 13-15). While he was there, a police officer, David Franczak, arrived at the request of management to remove Plaintiff and his friends, all Black, from the premises. (n.t., November 12, 1987, pp. 21-22). Officer Franczak specifically advised Plaintiff and his

friends that he could see no basis for them leaving, but they were not wanted there, so he requested that they leave. (n.t., 11/12/87, p. 22). Plaintiff and his friends indicated that they would leave when, suddenly, Officer Franczak noted, "Oh no, here comes Officer O'Donnell." (n.t., 11/12/87, p. 22). At that time, Plaintiff was suddenly grabbed from behind, spun around, and pushed outside of the building by Officer Anthony O'Donnell with the end of his night stick. (n.t., 11/12/87, pp. 22-24). Once outside, Defendant, O'Donnell struck Plaintiff several times with the night stick, handcuffed Plaintiff, and drove him to police headquarters. (n.t., 11/12/87, pp. 24-26).

At police headquarters, and while Plaintiff was still in handcuffs, Defendant, O'Donnell, grabbed Plaintiff by the

neck and began strangling him until another officer stopped him. (n.t., 11/12/87, pp. 31-32). After the strangling incident, a black police officer came into the room and guarded Plaintiff from further attacks by Officer O'Donnell. (n.t., 11/12/87, pp. 33-34).

In November 1987, the case proceeded to trial in which the district court excluded all Plaintiff's evidence against Defendant, City of Allentown, and then directed a verdict in favor of the City. The jury found in favor of Plaintiff against individual police officer. However, the jury illegally awarded no compensatory damages and $1,500.00 in punitive damages.

Plaintiff promptly moved for a new trial which was denied by the trial court,

(N.T. November 13, 1987, p. 4). Thereafter, the trial court urged the jury to go back into the deliberating room and divide the $1,500.00 into $750.00 for compensatory damages and $750.00 for punitive damages. (N.T., November 13, 1987, p. 8).

The trial court conceded in oral argument on Plaintiff's post-trial motions that he was urging the jury to do just that:

> "MR WALLITSCH: Your Honor, the only other point we had made was whether the Defendant was prejudiced by the award--the verdict came in. The zero compensatory initially and then with the $1,500.00 punitive and then they went back and split it up $750.00 and $750.00.
> THE COURT: After some urging by me.
> MR. WALLITSCH: Yes, sir.
> THE COURT: Right."

(N.T. May 20, 1988, p. 18).

Plaintiff contended that it was reversible error for the trial court to take an inconsistent verdict, and then "urge"

(to use the trial judge's words), that it be fixed by splitting the $1,500.00 punitive damages into $750.00 compensatory, and $750.00 punitive.

The District Court denied Plaintiff's post-trial motions on May 20, 1988. Plaintiff filed a timely appeal to the United States Court of Appeals For The Third Circuit.

After oral argument, the Circuit Court entered an Order and Opinion dated February 9, 1989 affirming the judgment against Defendant O'Donnell and reversing and remanding the judgment in favor of Defendant, City.

The Circuit Court limited the amount of damages recoverable against Defendant City to Seven Hundred Fifty ($750.00) Dollars, the amount of the compensatory damages awarded Plaintiff against Defendant

police officer after the trial judge reshaped the jury verdict.

Plaintiff sought rehearing of the Circuit Court's decision inasmuch as it strictly limits the amount of damages recoverable against Defendant City. On March 8, 1989, the Third Circuit denied Plaintiff's Petition For Rehearing. Plaintiff respectfully petitions this Honorable Court for a Writ of Certiorari.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(9) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter.

ARGUMENT

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT A CIVIL RIGHTS PLAINTIFF MAY NOT RECOVER COMPENSATORY DAMAGES AGAINST A MUNICIPALITY IN AN AMOUNT IN EXCESS OF THE AMOUNT OF COMPENSATORY DAMAGES WHICH THE TRIAL JUDGE URGED THE JURY TO AWARD AGAINST AN INDIVIDUAL POLICE OFFICER IN THE SAME SUIT?

On appeal, a panel of Circuit Judges held that this civil rights Plaintiff may not recover compensatory damages against Defendant, City in an amount in excess of compensatory damages which the trial judge urged the jury to award against the individual Defendant, Police Officer in this suit. The panel summarily stated that Plaintiff is estopped from attempting to recover damages from Defendant, City in excess of Seven Hundred Fifty (750.00) Dollars, the amount of compensatory damages the jury awarded against Defendant, Police Officer.

Inasmuch as the panel's decision limits the amount recoverable against Defendant, City, the decision contravenes well-established Federal law. Further, the amount of the compensatory damages which the jury awarded against the individual police officer was determined only after urging by the trial judge to enter an award in that amount.

1. The panel's decision is contrary to well-established Federal law. In Black v. Stephens, 662 F.2d 181 (3d Cir, 1981), cert denied, 455 U.S. 1008 (1982), the Third Circuit upheld a jury verdict against an undercover detective, a police chief and a city for damages arising out of a confrontation between the plaintiff and the undercover detective. Plaintiff sought damages against the detective for damages due to personal injuries and constitutional depri-

vations, sustained due to Defendant's excessive use of force. Plaintiff claimed Defendant, police chief, was liable for promulgating and implementing a regulation proximately causing Plaintiff's injuries. Plaintiff sought damages against the city based upon its police chief's actions which could fairly be said to represent official city policy.

After trial, a jury awarded $500.00 in compensatory damages against Defendant, detective; $3,000.00 in compensatory and $1,500.00 in punitive damages against Defendant, police chief; and $20,000.00 in compensatory and $10,000.00 in punitive damages against Defendant, City. The majority of the Circuit rejected Defendant's claim that the award was arbitrary and illegal because the jury awarded different amounts of damages against each

Defendant. Rather, the Court upheld the award of different amounts of damages against each Defendant apparently based upon the different legal claims and culpability of each Defendant.

Here, the panel's decision holds that an award of compensatory damages against an individual police officer as a matter of law cannot differ from an award of compensatory damages against a municipality in a civil rights action under 42 U.S.C.A. Section 1983. In this regard, the panel's decision contravenes the holding in Black v. Stephens, supra. In Black v. Stephens, supra, the Defendants specifically raised this issue and the Circuit Court held that the jury's award was not arbitrary and illegal. The panel decision in this case, however, does not allow Plaintiff to recover damages against the municipality in an

amount greater than that recovered against Defendant, police officer.

This Plaintiff's argument in support of greater damages against Defendant, municipality, is the same argument advanced by the Plaintiff in Black v. Stephens. Plaintiff contends that a jury could reasonably conclude that the City is more culpable than the individual police officer. Defendant O'Donnell is liable only for the initial use of force against Plaintiff, and thus for bodily injuries. Defendant, City, however, is liable for promoting a policy which led to the use of excessive force. Thus, in addition to liability for bodily injuries, the City is liable for proximately causing humiliation, mental distress, sleeplessness and attorney fees. The majority in Black v. Stephens implicitly accepted that a reasonable jury

could find the City more culpable than the individual police officer under these circumstances. Thus, Plaintiff must be allowed to seek compensatory damages against the City in an amount in excess of compensatory damages awarded against the individual Defendant.

2. The panel's decision improperly limits damages recoverable against Defendant, City to an amount which the trial judge improperly suggested to the jury. The jury returned a verdict in favor of Plaintiff and against Defendant, O'Donnell for zero dollar compensatory damages and $1,500.00 punitive damages. Plaintiff promptly moved for a mistrial which was denied by the trial court. (N.T., Nov. 13, 1987, p. 4). Thereafter, the trial court urged the jury to go back into the deliberating room and divide the $1,500.00 into

$750.00 for compensatory damages and $750.00 for punitive damages. (N.T. Nov. 13, 1987, p. 8). The trial court conceded in oral argument on Plaintiff's post-trial motions that he was urging the jury to do just that:

"MR WALLITSCH: Your Honor, the only other point we had made was whether the Defendant was prejudiced by the award--the verdict came in. The zero compensatory initially and then with the $1,500.00 punitive and then they went back and split it up $750.00 and $750.00.

THE COURT: After some urging by me.

MR. WALLITSCH: Yes, sir.

THE COURT: Right."

(N.T. May 20, 1988, p. 18)

Plaintiff contends that it was reversible error for the trial court to take an inconsistent verdict, and then "urge" (to use

the trial judge's words), that it be fixed by splitting the $1,500.00 punitive damages into $750.00 compensatory, $750.00 punitive.

Plaintiff proved individual Defendant deprived him of constitutional rights by use of excessive force. Nominal damages are presumed to flow from deprivation of constitutional rights. Bell v. Gayle, 384 F.Supp. 1022 (D.C., Tex. 1974); Magnett v. Pelletier, 360 F.Supp. 902 (D.C, Mass, 1973), remanded on other grounds 488 F.2d 33; Hewlett-Woodmere Public Library v. Rothman, 438 N.Y. F.2d 730 (1981); Batista v. Weir, 340 F.2d 74 (3d Cir, 1965); Bradley v. Coughlin, 671 F.2d 686 (1st Cir, 1982).

Upon the proof of nominal damages, punitive damages are allowed. Basista

v. Weir, 340 F.2d 74 (3d Cir, 1965); International Prisoners Union v. Rizzo, 356 F.Supp. 806 (D.C., Pa, 1973); Stollberg v. Members of Board of Trustees for State Colleges of St. of Conn., 474 F.2d 485 (1st Cir, 1973). Punitive damages may be awarded in a Section 1983 action without showing of actual loss by plaintiff of plaintiff's constitutional rights having been violated. Baltezore v. Concordic Parish Sheriff's Dept., 767 F.2d 702 (5th Cir, 1985).

Although Plaintiff was entitled to, at least, nominal damages as a matter of law, the District Court dissuaded the jury from reconsidering its inconsistent verdict and from awarding Plaintiff some nominal or compensatory damages. (N.T. Nov. 13, 1987, pp. 2-16). Instead, the District Court suggested that the jury adjust its verdict downwards, (N.T. Nov. 13, 1987, pp. 12-13),

without explaining that Plaintiff was entitled to other damages as a matter of law. The jury adjusted the verdict as suggested by the trial court.

Thus, even assuming arguendo that generally a Plaintiff should be limited in its recovery against a municipality as the panel decision held, that rule should not apply in this case. Plaintiff must not be limited by the amount of the jury verdict here because the trial judge improperly suggested what the amount of damages should be. Hence, even if the panel decision is correct as a general rule, it is unfair to apply that general rule to this case. Thus Plaintiff seeks a writ of certiorari of the Third Circuit decision inasmuch as it strictly limits damages recoverable against Defendant, City.

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA

Richard J. Orloski,
Attorney for Petitioner
ID# 09857

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1494

WALTER L. FLETCHER, JR.,
Appellant

versus

ANTHONY O'DONNELL and CITY
OF ALLENTOWN,

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges, and GERRY,* District Judge

The petition for rehearing filed by the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

_____

Chief Judge

Dated: March 8, 1989
*As to Panel Rehearing Only

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1494

WALTER L. FLETCHER, JR.,
Appellant

versus

ANTHONY O'DONNELL and CITY
OF ALLENTOWN,

(D.C. Civil No. 87-2115)
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF PENNA.

Present: GIBBONS, Chief Judge,
HUTCHINSON, Circuit Judge, and
GERRY, District Judge*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel December 15, 1988.

*Hon. John F. Gerry, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 24, 1988, be, and the same is hereby affirmed insofar as the judgment was against Officer O'Donnell and reversed insofar as the judgment was against the City of Allentown and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Sally Mrvos

Clerk

February 9, 1989
Certified as a true copy and issued in lieu of a formal mandate on March 16, 1989.
Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1494

WALTER L. FLETCHER, JR.,
Appellant

versus

ANTHONY O'DONNELL and CITY
OF ALLENTOWN,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 87-2115)

Argued: December 15, 1988
Before: GIBBONS, Chief Judge,
Hutchinson, Circuit Judge,
and GERRY, District Judge

(Opinion Filed: February 9, 1989)

RICHARD J. ORLOSKI, ESQ. (Argued)
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Allentown, PA 18103

Attorneys for Appellant, Walter
Fletcher, Jr.

*Hon. John F. Gerry, Chief Judge, United states District Court for the District of New Jersey, sitting by designation.

THOMAS A. WALLITSCH, ESQ. (argued)
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WALLITSCH & MARLES
The Traylor, Suite 602
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Allentown, Pa 18102

Attorneys for Appellees, Anthony
O'Donnell and City of Allentown.

OPINION OF THE COURT

GIBBONS, Chief Judge:

Walter L. Fletcher, Jr., the plaintiff in a Civil Rights Act suit against police officer Anthony O'Donnell and his employer, the City of Allentown, Pennsylvania, appeals from a judgment in Fletcher's favor against Officer O'Donnell but in favor of the City. The judgment against Officer O'Donnell was entered on a jury verdict finding $750.00 in compensatory and $750.00 in punitive damages. Fletcher contends that the damage verdict was the result of an improper instruction and that a new trial should be awarded. The judgment in

favor of the City of Allentown was entered after the court granted the City's motion for a directed verdict. Fletcher contends that, taking into account evidence which was improperly excluded, the court erred in granting that motion. We will affirm the judgment against Officer O'Donnell. We will reverse the judgment in favor of the City and remand for further proceedings.

I.

From the evidence admitted at trial, the jury could find that Fletcher, a black male, was sitting with black friends at a "white" bar in Allentown when the bar management asked him to leave. When he declined to do so, the management called the Allentown Police. Two officers responded. One of them, Officer O'Donnell, grabbed Fletcher from behind, shoved him

out of the bar with a nightstick, and hit him with the nightstick while they were in the parking lot. O'Donnell then handcuffed Fletcher and drove him to the police station. There O'Donnell choked him until another officer intervened to prevent further injury to Fletcher.

Officer O'Donnell's version of the events is different. The trial court concluded that the case against him should go to the jury. The jury answered interrogatories as follows:

1. Has the plaintiff, Walter L. Fletcher, Jr. proved by a preponderance of the evidence that the defendant, Anthony O'Donnell, arrested him without probable cause?

Answer: No.

2. Has the plaintiff, Walter L.

Fletcher, Jr. proved by a preponderance of the evidence that the defendant, Anthony O'Donnell used excessive force at the time of his arrest and/or at the Allentown Police Station?

Answer: Yes.

3. State in dollars the amount of compensatory damages Walter L. Fletcher, Jr. incurred as a result of the conduct of Anthony J. O'Donnell.

Answer: Nothing.

4. State in dollars the amount, if any, you award to Walter L. Fletcher, Jr. for punitive damages.

Answer: Fifteen Hundred Dollars.

Fletcher's counsel objected that the verdict was inconsistent, in that the jury found he had been subjected to excessive force but did not award compensatory damages. The trial court agreed, and asked

the jury to reconsider its verdict. The court instructed the jury that if O'Donnell used excessive force some compensatory damages should be awarded, and that the award of punitive damages must bear some relationship to the compensatory award.

Fletcher contends that the court erred in reinstructing the jury. It is his position that the reinstruction amounted to a direction to the jury that it should reduce the punitive damage award in order to award some compensatory damages and reconcile the verdict. The court certainly mentioned the possibility that the punitive damage award might be reduced. However, we may not look at that suggestion in isolation:

> In examining an alleged erroneous instruction to the jury, it is necessary to view the charge as a whole. Our function is to determine whether the charge, taken as a whole

> and viewed in light of the evidence, fairly and adequately submits the issues in the case to the jury.

Ayoub v. Spencer, 550 F.2d 164, 167 (3d Cir, 1977) (citation omitted). The trial judge also instructed the jurors that if they thought $1500 in punitive damages was correct, they could leave the punitive damage verdict at $1500 and make a compensatory award as well. e even instructed that the all-powerful jury could stand by their prior determination, although he informed them such an outcome would result in a new trial. Our review of the reinstruction as a whole convinces us that there was no error.

After the reinstruction the jury deliberated further and awarded Fletcher $750.00 in compensatory and $750.00 in punitive damages against O'Donnell.

II.

In an effort to establish the liability of the City of Allentown, Fletcher attempted to prove that O'Donnell's use of excessive force was pursuant to a City custom of tolerating such conduct by its police officers which was a proximate cause of his injury. A city may be held liable for an official policy or a custom which proximately causes a constitutional deprivation. A single incident violating a constitutional right done by a governmental agency's highest policymaker for the activity in question may suffice to establish an official policy. See, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (County attorney's decision to have sheriffs enter premises established official policy). A single incident by a lower level employee acting under color of law, however, does not suffice to establish

either an official policy or a custom. However, if custom can be established by other means, a single application of the custom suffices to establish that it was done pursuant to official policy and thus to establish the agency's liability. Oklahoma City v. Tuttle 471 U.S. 808 (1985). Custom may be established by proof of knowledge and acquiescence. See, Pembaur v. Cincinnati, 475 U.S. at 482 n.10.

Fletcher attempted to prove that Allentown had a custom of allowing excessive force by its police officers. He offered the testimony of Charles Cerva about an incident of use of excessive force by O'Donnell, Cerva's report of the incident to the Mayor and Chief of Police, and the failure of the City to investigate that complaint in any manner. He also sought to

cross-examine O'Donnell about prior complaints against him of excessive use of force, in addition to the Cerva incident. These incidents allegedly included shooting a youth who ran from O'Donnell after attempting to steal parts from a car, and threatening to shoot someone involved in a traffic accident. Fletcher also sought to establish through O'Donnell's testimony that despite complaints against him the City took no action against him, at least respecting the Cerva complaint.

The trial court excluded Cerva's testimony and refused to permit O'Donnell's cross-examination about prior incidents of excessive force. The court gave several reasons for this ruling, none of which are legally sufficient. The first was that the other incidents involved allegedly exces-

sive force against white people, and Fletcher was black. Had Fletcher been proceeding solely on a theory that there was a custom of use of excessive force only against blacks that ruling might have been within the range of discretion conferred in Fed. R. Evid. 403. Here, however, Fletcher complained that the excessive use of force was itself the violation complained of.

A second reason was that allowing proof of prior bad acts by Officer O'Donnell as a part of the case against the City would unduly prejudice O'Donnell, and was not relevant to the claim against him in his personal capacity. No doubt it would be prejudicial, but that prejudice was not a valid reason for preventing Fletcher from attempting to prove a custom of toleration of use of excessive force by using the only evidence which would suffice

for that purpose. There were other means available to protect O'Donnell from such prejudice, including a limiting instruction. Indeed, the court could have heard the evidence outside the presence of the jury in the first instance, in order to determine whether Fletcher could establish a prima facie case of prejudice. Finally, the court could even consider a severance. None of these alternatives appears to have been considered.

Another reason relied on by the trial court was that Fletcher did not need a judgment against the City because the City would pay any judgment against O'Donnell. The court's reference apparently is to an indemnity undertaking which is not of record. The attorney for the City stated on the record that the City would pay any award. It appears that this representation

referred only to compensatory damages since under Pennsylvania law an undertaking to indemnify for punitive damages is against public policy. Feingold v. Southeastern Pennsylvania Transp. Auth. 512 Pa. 567, 517 A.2d 1270, 1277 (1986). This reason for excluding the evidence is legally insufficient, for only O'Donnell, not Fletcher, is a party to the indemnity undertaking; Fletcher has not been paid and has no direct claim against the City.

Finally the trial court contended that if the evidence were admitted it would not suffice to establish a claim against the City. For the reasons set forth at the outset of this Part II, that ruling, on the record as it now stands, was error. Had the court admitted the tendered testimony Fletcher might have fallen short, since we do not know precisely how Cerva or O'Donnell would have responded. The offer of

proof, however, was legally sufficient to require that he be cross-examined.

Since there was no proof of official policy and no proof of a custom of tolerating excessive use of force, the trial court granted the City's motion for a directed verdict. Since the directed verdict depended on the erroneous exclusion of evidence, it must be reversed.

III.

In Part I above we hold that the compensatory award of damages against O'Donnell must be affirmed. That judgment establishes the amount of compensatory damages suffered by Fletcher. At any new trial, even against the City, Fletcher will be estopped by that judgment from attempting to recover compensatory damages in excess of that amount. No. punitive dam-

ages may be recovered from the City. Newport v. Fact Concerts, Inc. 453 U.S. 247 (1981). Thus although we are reversing the directed verdict against the City all that will be involved is its potential liability for the compensatory damages suffered by Fletcher. Obviously if the City elects to pay the $750.00 Fletcher's claim against it would be moot.[1]

The judgment against Officer O'Donnell will be affirmed. The judgment in favor of the City of Allentown will be reversed and the case remanded for proceedings consistent with this opinion.

---

1. No question of attorneys fees is presented by this appeal.

A true copy:
Teste:
Clerk of the United States Court of Appeals
For the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER L. FLETCHER, JR.	:	CIVIL ACTION
	:	
vs.	:	NO. 87-2115
	:	
ANTHONY O'DONNELL,	:	
	:	

O R D E R

AND NOW, this 20th day of May, 1988, following oral argument, IT IS ORDERED AND DECREED that all pending post-trial motions are DENIED.

BY THE COURT:

_____
Edward N. Cahn, J.

ENTERED: 5/24/88

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1807

In The

Supreme Court of the United States

October Term, 1988

WALTER FLETCHER, JR.,

Petitioner,

vs.

ANTHONY O'DONNELL and
CITY OF ALLENTOWN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT

THOMAS A. WALLITSCH
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Counsel for Respondents,
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I. QUESTION PRESENTED FOR REVIEW

1. SHOULD A WRIT OF CERTIORARI BE ISSUED IN THE CASE WHERE THE COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUE OF DAMAGES AND WHERE THERE IS NO CONFLICT BETWEEN DECISIONS OF DIFFERENT FEDERAL COURTS OF APPEALS ON THE SAME MATTER?

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4. *National Assn. of Greeting Card Pubs. v. USPS*, 462 U.S. 810, 77 L. Ed. 2d 195, 103 S. Ct. 2717 (1963) 6

III. STATEMENT OF THE CASE

The Petitioner, Walter Fletcher, Jr., filed suit in the United States District Court for the Eastern District of Pennsylvania against Anthony O'Donnell, a patrolman employed by the City of Allentown, and the City of Allentown. In Mr. Fletcher's Complaint, he alleged that the Respondent Anthony O'Donnell arrested the Petitioner without cause, used excessive force during that arrest, and filed and procescuted false criminal charges against the Petitioner. Mr. Fletcher further alleged that Respondent City of Allentown had enacted a policy of invidious discrimination and had failed to properly supervise Officer O'Donnell, and was , therefore, liable in damages to the Plaintiff. In November of 1987, the case proceeded to trial. The trial court directed a verdict in favor of Respondent City of Allentown. The jury found that Officer O'Donnell had used excessive force in his arrest of Mr. Fletcher, and awarded Petitioner no compensatory damages and $1,500.00 in punitive damages. The court, realizing that the jury's verdict was inconsistent, reinstructed the jury on the issue of damages. The jury then reached a verdict of $750.00 in compensatory damages and $750.00 in punitive damages. Mr. Fletcher filed post-trial motions. The court denied these motions. The United States Court of Appeals for the Third Circuit affirmed the judgment against Officer O'Donnell, but reversed the directed verdict which had been enterend by the trial court in favor of the City. In its Opinion, the Court of Appeals stated that the amount of these compensatory damages had been decided by the jury's verdict against Officer O'Donnell. The Court of Appeals also stated that punitive damages could not be recovered from

the City, and therefore, the only issue which would be resolved on a remand would be the City's potential liability for the amount of compensatory damages awarded by the jury.

A Petition for Rehearing was then filed by Mr. Fletcher and was denied. Mr. Fletcher has now filed a Petition for a Writ of Certiorari with this Honorable Court. This Petition is now before the Court for its consideration.

IV. SUMMARY OF ARGUMENT

The issue present in the case at bar is whether or not the trial court properly instructed the jury on the issues of damages after the jury initially returned an inconsistent verdict. The trial court properly instructed the jury as the court properly advised the jury as to the various methods which the jury could employ in order to remedy its inconsistent verdict. Furthermore, the trial court advised the jury that it could return the same verdict, if this was the verdict that the members of the jury thought appropriate.

Since this instruction as a whole presented the issues to the jury and advised the jury as to the alternatives which could be used to remedy the inconsistency in its initial verdict, the instruction was proper.

The Petitioner has also alleged that a Writ of Certiorari would be proper in this case, since the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

As support for this allegation, Petitioner cites *Black v. Stephens*, 662 F.2d 181 (3rd Cir., 1981, cert. denied 455 U.S. 1008, 102 S. Ct. 1646), 71 L. Ed. 2d 876 (1982). However, *Black, supra,* is also a decision of the Third Circuit Court of Appeals, and therefore cannot be cited for the proposition that two different Courts of Appeals have rendered conflicting decisions on the same matter. Furthermore, the issue decided in *Black, supra,* and the issue decided by the Court of Appeals in the case at bar are different issues, preventing the two decisions from being conflicting decisions on the same matter.

V. ARGUMENT

A THE JURY INSTRUCTION ON THE ISSUE OF DAMAGES WHICH WAS ISSUED BY THE TRIAL COURT AND REVIEWED BY THE COURT OF APPEALS WAS PROPER AND DID NOT INCORRECTLY SUGGEST AN AMOUNT OF DAMAGES TO THE JURY.

At trial, the jury returned the verdict which stated that the Plaintiff had proven that Officer O'Donnell had used excessive force at the time of his arrest of the Plaintiff and/or at the Allentown Police Station. However, the jury found that the Plaintiff had incurred no compensatory damages as a result of Officer O'Donnell's conduct. However, the jury awarded $1,500.00 in punitive damages. The trial court, recognizing that the jury's verdict was inconsistent and could be grounds for new trial, decided to reinstruct the jury on the issue of damages. The court then instructed the jury as follows:

> All right, members of the jury, we have a problem with your verdict. There is no problem with Questions 1 and 2. The problem with your verdict is that, notice I said in Question 4, state in dollars the amount, if any. In Question 4, you would have the right to insert no dollars or nothing. But you can't do it in Question 3. The reason for that is, you must award something in Question 3 because to find yes in Question 2, you either found excessive force outside of Mr. Be's, or you found excessive force at the Allentown Police Station, or you found both . . . . (N.T. Nov. 13, 1987, p. 8).

The court further instructed the jury as follows:

> Now there's a couple of things that have happened here. You may have evaluated this case as a fifteen hundred dollar case and put nothing in Question 3 and all of the fifteen hundred dollars in Question 4. If that's what you did, you could subtract something from the fifteen hundred, add it in Question 3 and still come out at fifteen hundred. That's possible and whether you do that or not is up to you.
>
> If you thought the fifteen hundred dollars was the right amount for punitive, there's another problem with that. The problem with that is that punitives must, as I told you earlier, must bear a reasonable relationship to the compensatory damages. So if there's no compensatory damages there really can't be much punitive damages.
>
> Now what I think–I don't want to restrict how you handle this in any way, but what I think what you ought to do is determine whether or not it was your collective judgment that the fifteen hundred dollars total was the right verdict. If that was your judgment, then you ought to adjust the fifteen hundred downward and put something in Question 3.
>
> If your thinking was that the fifteen hundred dollars was the right punitive, then you ought to put something in Question 3, some number, that bears a

> relationship to what Mr. Fletcher underwent in this incident through the excessive force that you found by virtue of your yes answer to Question 2, and put appropriate number in there. . . .
>
> So I would like you to go back and consider what I said, revise your numbers appropriately and you may vary the fifteen hundred dollar number downward if you wish, and you may consider an appropriate number to put in number three, if you wish. (N.T. Nov. 13, 1987, pp. 8-9).

The Plaintiff, throughout the various proceedings related to this case, has been alleging that this instruction improperly suggested to the jury that it should round the $1,500 punitive damages award downward, thereby imposing a limit on the amount of damages which could be awarded by the jury. However, this is not the case. First of all, a jury instruction must be viewed in conjunction with the court's entire charge in order to determine whether a new trial is warranted. *Cupp v. Naughten*, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed. 2d 368 (1973). The rule regarding whether or not an instruction is proper has been stated:

> Our function is to determine whether or not the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the issue in the case to the jury. *Ayoub v. Spencer*, 550 F.2d 164, 167 (3rd Cir., 1977), cert. denied 432 U.S. 907, 97 S. Ct. 2952, 53 L. Ed. 2d 1079 (1977).

When the above instruction is viewed in this light, we see that the instruction was proper. This is true because as well as mentioning the possiblity that the punitive damages award might be reduced, the court also instructed the jury that they had the authority to decide whether the $1,500 punitive damages award was correct. The court

informed the jury that they had the power to make a compensatory damages award in addition to the $1,500 in punitive damages. Futhermore, the court instructed the jury that they could leave their verdict as it stood, while forewarning the jury that following that course of action would be grounds for a new trial. In short, the court's instruction fairly adequately submitted the issues in the case to the jury and the charge as a whole was proper.

B. CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE, SINCE A FEDERAL COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS ON THE SAME MATTER.

In Petitioner's Petition, it is stated that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Under U.S. Supreme Court Rule 17, one reason which will be considered when the court decides whether or not to review a decision on a Writ of Certiorari, is whether or not a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. This court has intrepreted this rule to mean that in order for there to be a conflict, two decisions of Courts of Appeals of different circuits must exist. See *Nat. Assn. of Greeting Card Pubs. v. USPS*, 103 S. Ct. 2717, 462 U.S. 10, 77 L.Ed. 2d 195, where this court stated that it had granted certiorari because there were inconsistencies in the holdings of the Second and the District of Columbia Circuits. Petitioner argues that the decision of the Court of Appeals which the jury

rendered is in conflict with another Court of Appeals decision on the same matter, *Black v. Stephens*, 662 F.2d 181 (3rd Cir., 1986) cert. denied 102 S. Ct. 1646, 455 U.S. 1008, 71 L.Ed. 2d 876 (1982), another decision of the Third Circuit Court of Appeals. There can be no conflict between the decisions of any different circuits, since *Black, supra,* and the decision by the Court of Appeals in the case at bar are both decisions of the Court of Appeals from the Third Circuit.

In addition to the fact that the decisions are from the same circuit, the decision of the Court of Appeals for the Third Circuit in the case at bar and the decision in *Black, supra,* are not conflicting decisions on the same matter. In *Black, supra.,* the district court had awarded damages against three different defendants in a civil rights suit. On appeal, the defendants claimed that they were entitled to a new trial because the award of damages against all three defendants was arbitrary and excessive. The appeals court affirmed the jury's award of damages, stating that the verdict was not so excessive as to call for a reversal of the jury's verdict. The court also took note that the jury was properly instructed on the issues relating to compensatory and punitive damages.

Likewise, in the case at bar, the Court of Appeals affirmed the instruction on the issue of damages given by the trial court. However, the issue on appeal in the case at bar was whether the court had improperly suggested to the jury that it should reduce the punitive damage award in order to award some compensatory damages in order to reconcile an inconsistent verdict. The Court of Appeals rejected this argument, stating that as a whole, the court's instructions on the issue of damages given by the trial

court was proper. The issue of whether the jury's award was excessive has not been raised on appeal by either party. Therefore, the Petitioner's allegation that the decision in *Black, supra* and the Court of Appeals' decision in the case at bar are in conflict or relate to the same matter is without foundation. First of all, as previously stated, the issues being considered by the courts in their respective decisions were not the same issue. In one case, the issue was the excessiveness of the damages; in the other case it was whether the court had improperly suggested to the jury that it award a certain amount of damages. Since the issues decided in the respective decisions were not the same issue, the decision cannot be in conflict on the same matter.

Furthermore, both decisions were handed down by the same circuit, and therefore they are not decisions of different Appeals Courts for the purposes of U.S. Supreme Court Rule 17.1(a).

VI. CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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